(11)

No. 89-7662

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1990

ROGER KEITH COLEMAN,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN,
MECKLENBURG CORRECTIONAL CENTER
OF THE COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF TEXAS, ALASKA, CALIFORNIA, MISSISSIPPI, OKLAHOMA, SOUTH DAKOTA, AND WYOMING IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I. When the Virginia Supreme Court expressly granted the Commonwealth's motion to dismiss Petitioner's state habeas corpus appeal, and the motion was based solely on petitioner's untimely notice of appeal, does *Harris v. Reed*, 489 U.S. 255 (1989), present any obstacle to enforcement of the procedural default doctrine?

II. Does the "deliberate bypass" test have any application in the context of a procedural default which occurred during a state collateral appeal?

III. Can a petitioner successfully assert attorney error as "cause" for a default which occurred during state habeas proceedings where he had no constitutional right to counsel but was represented by three retained attorneys of his own choosing?

(This brief addresses only the first question presented for review.)

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME the States of Texas, Alaska, California, Mississippi, Oklahoma, South Dakota, and Wyoming, by and through the Attorney General of Texas, and file this Brief Amicus Curiae in Support of Respondent, Charles E. Thompson, Warden, Mecklenburg Correctional Center of the Commonwealth of Virginia.[1]

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[1]For clarity, Petitioner will be referred to as "Coleman."

INTEREST OF AMICI

Amici are States with an interest in continued federal respect for the procedural bars imposed by state courts and in the considerations of federalism, comity, and finality from which the federal habeas doctrine of procedural default derives.

This brief is submitted by *amici* through their respective Attorneys General or Chief State Attorneys in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF THE CASE

Following a four day trial, on March 18, 1982, a Virginia jury convicted Coleman of the rape and capital murder of his sister-in-law. A separate capital sentencing hearing ensued, and the jury recommended a sentence of death upon findings of Coleman's future dangerousness and the "outrageously or wantonly vile" nature of his crime. In accordance with the jury's verdict, the trial court assessed punishment at death. On September 9, 1983, the Virginia Supreme Court affirmed Coleman's conviction and sentence. *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983). Coleman's direct appeal concluded on March 19, 1984, when this Court denied his petition for writ of certiorari. *Coleman v. Virginia*, 465 U.S. 1109 (1984).

On April 26, 1984, thirty-six days after the denial of certiorari review, Coleman through his counsel of choice filed a petition for state habeas corpus relief in the trial court. After conducting a two day evidentiary hearing and upon making detailed findings of fact and conclusions of law, the trial court on September 4, 1986, denied habeas relief (JA 3-19).[2] Coleman's counsel filed notice of appeal

[2]"JA" refers to the Joint Appendix in this case, with citation to applicable page numbers.

on October 7, 1986, outside the thirty-day time period prescribed by Virginia law. Thereafter, he unsuccessfully sought from the trial court a "correction" of the date of judgment. In the Virginia Supreme Court, the Commonwealth moved for dismissal of the appeal solely on the basis of Coleman's untimely filing of notice of appeal. On May 19, 1987, that court expressly granted the Commonwealth's motion to dismiss.[3]

On April 22, 1988, Coleman initiated a federal habeas action in the United States District Court for the Western District of Virginia. The district court on December 6, 1988, denied habeas corpus relief, concluding that Coleman's appellate default on state habeas foreclosed federal review of certain claims and, alternatively, addressing the claims as if that procedural bar did not exist. *Coleman v. Thompson*, Civil Action No. 88-0125-A, mem. op. (W.D. Va. Dec. 6, 1988) (JA 35-52). On January 31, 1990, the United States Court of Appeals for the Fourth Circuit affirmed, primarily on the basis of Coleman's procedural default during state habeas proceedings. Significantly, the court below held that the order of dismissal was not ambiguous within the meaning of *Harris v. Reed*, 489 U.S. 255 (1989), because the state law basis of decision was clear. *Coleman v. Thompson* 895 F.2d 139, 143 (4th Cir. 1990) (JA 53, 57-58).

SUMMARY OF ARGUMENT

The Court should restrict the applicability of the plain statement rule on federal habeas review to those cases in which there is "an ambiguous [state court] reference to state law in the context of clear reliance on federal law." *Harris v. Reed*, 489 U.S. 255, 266 n.13 (1989).

[3]Since then, Coleman repeatedly has acknowledged that his appeal was dismissed as untimely.

The condition precedent to application of the plain statement rule of *Michigan v. Long*, 463 U.S. 1032 (1983), is a state court's disposition of a federal issue. On direct review, the plain statement rule serves federal and state interests. It limits this Court's forays into the unfamiliar territory of state law and prevents the mere possibility of an independent and adequate state ground from interfering with this Court's performance of its role as ultimate expositor of federal constitutional law. The state's interest in finality is served where an erroneous decision of federal law is corrected close to the time of trial, and concerns of comity are accommodated because the state court has an opportunity, on remand, to rectify this Court's erroneous assumption of the absence of a state law ground of decision. These federal interests are only slightly, if at all, implicated on habeas review, while the concerns of comity and finality are accommodated to a significantly lesser degree.

Moreover, the plain statement rule can be applied easily and rationally on federal habeas review only in atypical cases. In cases where the last state court entering a judgment does not provide reasons for its disposition, or where the petitioner raises multiple claims for relief or presents repetitive petitions, the plain statement rule is likely to nullify the clear intent of state courts to impose procedural bars. Particularly in the more typical cases, there is a need for the lower federal courts, which are familiar with local law and must inevitably apply it, to be able to consider state law and the state court record to determine whether the plain statement rule is applicable.

Finally, on direct review, the plain statement rule assumes the prior presentation of claims to state courts in a procedurally correct manner. Where federal claims have been presented to state courts in a procedurally inappropriate manner, federal habeas courts should not presume that the state courts nonetheless passed upon the claims. At the very least, the lower federal courts should be authorized to follow this Court's example and consider

state law and the state court record in making the determination whether the condition precedent to application of the plain statement rule--a fair appearance of reliance on federal law--exists.

ARGUMENT

Coleman's failure to file timely a notice of appeal from the state trial court's denial of habeas relief precluded the Virginia Supreme Court from reviewing his claims. That court granted the Commonwealth's motion to dismiss Coleman's appeal, a motion based exclusively on Coleman's failure to file a notice of appeal within the mandatory and jurisdictional time limits prescribed by statute. The courts below correctly held that Coleman's forfeiture of his claims in state proceedings likewise foreclosed federal habeas corpus review and rejected Coleman's attempt to transform the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), into a tool for injecting ambiguity into a state court decision that clearly was founded upon state procedural grounds.

I.

LONG'S SPECIFIC FORMULATION OF THE PLAIN STATEMENT RULE CANNOT BE APPLIED SENSIBLY AND RATIONALLY IN MOST CASES ON FEDERAL HABEAS REVIEW.

In *Harris v. Reed*, 489 U.S. 255 (1989), the Court extended the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983), to federal habeas actions brought under 28 U.S.C. § 2254. The *Long* Court held that where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," the mere existence of a possible adequate and independent state ground of decision will not foreclose direct Supreme Court review; rather, the state court must include a plain

statement of reliance on state law as a ground of decision separate from the federal issue. *Long*, 463 U.S. at 1040-41. As *Long* makes clear, a condition precedent to application of the "plain statement" rule is that federal law at least "fairly appear" to be the basis for the state court decision under review. In extending *Long* to habeas actions, this Court recognized, "[i]t is precisely with regard to . . . an ambiguous reference to state law in the context of clear reliance on federal law that *Long* permits federal habeas review of the federal issue." *Harris v. Reed*, 489 U.S. at 266 n.13.

The "plain statement" rule arose in the unique context of certiorari review of a state conviction via direct appeal in state court, and sound practical and prudential considerations justify its application in that context. However, in the equally unique context of habeas corpus review, the federal interests underlying *Long* are much less weighty. Moreover, the "plain statement" rule is particularly ill suited to the realities of post-conviction practice, and to apply it in the manner proposed by Coleman would unduly undermine concerns of federalism, comity, and finality. Accordingly, this Court should expressly tailor the "plain statement" rule of *Long* to fit habeas actions.

A. Policy Concerns

In *Long*, the Court articulated several justifications for the plain statement rule. First, the plain statement rule allows the Court to avoid advisory opinions without impeding the expeditious and orderly administration of review procedures. Unlike the process of asking the state court to clarify the basis of its decision, the plain statement rule does not delay federal review or burden state courts with reconsideration of previously adjudicated cases. Second, because this Court generally is not familiar with local law and procedures, the plain statement rule decreases the burdens on the Court of consideration of state law issues. Third, when applied on direct review, the plain statement

rule preserves the independence of state courts and state law by reducing the chance that this Court will needlessly pass upon state law questions. *Long*, 463 U.S. at 1039-40.

Further, application of the plain statement rule by this Court on certiorari review serves the important federal interest of facilitating review by way of direct appeal. The Court has long recognized that direct appeal is the preferred method for review of state criminal convictions.

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review.

Mackey v. United States, 401 U.S. 667, 682 (1971) (separate opinion of Harlan, J.) (emphasis in original).

> [D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review--which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari--comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas corpus proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

The Court's recent decisions in the area of retroactivity attach even greater significance to direct appeal, because new rules of constitutional law generally will not be applied on collateral review. *Teague v. Lane*, 489 U.S.

288 (1989). Following *Teague*, most new rules of federal constitutional law and applications of established principles that were not dictated by existing precedent will be announced on direct review. *Butler v. McKellar*, ___ U.S. ___, ___, 110 S. Ct. 1212, 1217-18 (1990). The development of federal constitutional law, thus, increasingly depends on this Court's ability to review the opinions of state appellate courts on direct review, and where prudential considerations make an issue ripe for review by this Court, there is additional incentive for this Court to grant review in the procedural context of direct appeal. If, in *Long*, this Court had reaffirmed its prior practice of denying review on direct appeal based on the mere possibility of an independent and adequate state ground, the Court's function of announcing new principles of constitutional law would have been hampered.[4]

Moreover, this Court has an interest in granting review to address incorrect or aberrant applications of federal constitutional principles. As the *Long* Court recognized, "an important need for uniformity in federal law . . goes unsatisfied when we fail to review an opinion that rests primarily on federal law and where the independence of an alleged state ground is not apparent from the four corners of the opinion." *Long*, 463 U.S. at 1040 (emphasis omitted). Thus, following *Teague*, the plain statement rule plays an important role in facilitating the Court's role as ultimate expositor of constitutional law.

Similarly, state interests are accommodated by application of the plain statement rule to cases on direct review. Concerns of finality, although relevant even on

[4]An independent and adequate state ground stands as an absolute bar to direct Supreme Court review of state court decisions. *Long*, 463 U.S. at 1041-42. This bar is unlike the habeas doctrine of procedural default, which authorizes federal habeas review upon a petitioner's showing of cause and prejudice or a miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 493-96 (1986).

direct review, *Boyde v. California*, ___ U.S. ___, ___, 110 S. Ct. 1190, 1198 (1990), are not as strong as in federal habeas review. Direct appeal is the review process that is closest in time to the "main event" of trial. If a state court's misapplication of constitutional principles results in the erroneous affirmance of a criminal conviction, the state's ability to retry the defendant is less likely to be jeopardized. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 128-29 (1982). Thus, the defendant's remedy for an incorrect state court decision is more likely to be a retrial that comports with constitutional requirements than an effective acquittal.

In addition, comity considerations are not undermined when the plain statement rule is applied on direct review. The direct appeal process typically produces written opinions, in which appellate courts set forth the bases for decision, and the *Long* Court did not purport to dictate to the state courts the manner in which they must conduct direct review. Rather, within the existing framework of direct appeals, the Court merely apprised state appellate courts of the manner in which they could demonstrate the presence or absence of Supreme Court jurisdiction. Where, as in *Long*, the state court addresses the merits of a federal issue and also refers to state law, requiring it also to include a "plain statement" of reliance on state law imposes relatively few burdens.

Further, if on direct review this Court erroneously assumes that the absence of a plain statement indicates that there was not a state law basis for the state court's decision and decides the federal question, the state court may, on remand, correct this misimpression by plainly relying on state law, thus insulating its judgment from further federal review.[5] Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Feder-*

[5]This mechanism for preserving a ruling that is adquately and independently based on state law is unavailable to the state courts if the state conviction is reversed in federal habeas review.

alism Along a Mobius Strip, 19 GA. L. REV. 799, 822 (1985). Indeed, one study found that, when the Court has assumed the absence of an independent and adequate state ground, the state courts on remand resolved sixty percent of the cases on the basis of state law. *Id.* at 819, *citing* Welsh, *Whose Federalism?--The Burger Court's Treatment of State Civil Liberties Judgements*, 10 HASTINGS CONST. L.Q. 819, 838 (1983); *see also Ponte v. Real*, 471 U.S. 491, 503 n.4 (1985) (Stevens, J., concurring in part) ("In a series of recent cases, this Court has reversed a state decision grounded on a provision in the Federal Bill of Rights only to have the state court reinstate its judgment, on remand, under a comparable guarantee contained in the State Constitution.") and cases cited therein.

Application of the plain statement rule to cases on direct review, thus, furthers state and federal interests. In contrast, the policies underlying *Long* are only marginally, if at all, implicated on habeas review. Moreover, the weighty considerations of comity and finality on habeas review are eviscerated by literal application of a plain statement rule that is tailored for direct review of state judgments. Federal respect for state procedural bars is now exacted at the price of federal interference in the state judicial systems. Moreover, state compliance with the plain statement rule on collateral review is so burdensome as to threaten the orderly administration of justice in the state courts.

The policy against advisory opinions is not implicated by federal habeas review, because a federal court's erroneous determination that it has jurisdiction over a federal issue and a subsequent reversal of a state conviction on that basis cannot be corrected by the state court's reliance, on remand, on an independent and adequate state ground. Further, the interest of facilitating Supreme Court review of constitutional issues on direct appeal clearly does not apply to federal habeas review. Accordingly, the Court in *Harris v. Reed* justified the extension of

the plain statement rule by assuming that federal habeas review would be expedited if federal courts were not "required to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case." *Harris*, 489 U.S. at 265. Application of *Long's* plain statement rule, however, does not significantly reduce the inquiries into state law that federal habeas courts must make and, concomitantly, does not expedite federal habeas review. Rather, inquiries into state law are inevitable on federal habeas review, and the lower federal courts are well equipped to answer them.

Federal habeas courts not only are authorized, but required, to ascertain the potential applicability of state procedural bars in assessing the availability of state remedies. The federal habeas statute provides that the requirement of exhaustion of state remedies is excused where "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b). This Court has made clear that one circumstance rendering available state process "ineffective" is a state procedural bar to review of the petitioner's claim. *Teague v. Lane*, 489 U.S. at 297-98; *Harris v. Reed*, 489 U.S. at 268-70 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., concurring). Moreover, where the exhaustion requirement is excused, the federal courts are expected to apply state procedural rules and bar federal habeas review, unless the petitioner overcomes his default by showing cause for his default and actual prejudice resulting therefrom. *Teague v. Lane*, 489 U.S. at 298-99.

Further, in determining whether a state procedural default forecloses federal habeas review, a federal court must decide whether the state ground of decision is adequate and independent, a determination that frequently entails a thorough examination of state law. In determining the adequacy of the state procedural ground, a federal court is called upon to decide whether the procedural bar is

routinely and regularly applied by the state courts and, thus, must necessarily consider an entire body of state law. *E.g., Dugger v. Adams*, 489 U.S. 401, 410-11 n.6 (1989). Moreover, a challenge to the adequacy of the state procedural grounds may, in some instances, require the federal court to consider the state procedural rule's origins and potential applications and whether the rule rationally furthers legitimate state interests. *James v. Kentucky*, 466 U.S. 341, 344-49 (1984). Further, even the existence of a state procedural bar that is facially independent of federal law does not obviate further inquiry into its "independence." Federal courts must ascertain whether the basis of the procedural rule and state crafted exceptions to application of that rule are state, rather than federal, in nature. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). At best, therefore, the plain statement rule merely shifts the focus of the federal court's examination of state procedural default rules.

Finally, the lower federal courts have a familiarity with state law that this Court cannot be expected to acquire. Accordingly, this Court defers to the lower federal courts on matters of local law. *E.g., Selvage v. Collins*, ___ U.S. ___, ___, 110 S. Ct. 974, 974 (1990) (remanding to allow Fifth Circuit initially to determine whether Texas courts would continue to apply procedural defaults following *Penry v. Lynaugh*, ___ U.S. ___, 109 S. Ct. 2934 (1989)); *Rummell v. Estelle*, 445 U.S. 263, 267 n.7 (1980) (deferring to Fifth Circuit's determination that Texas law did not bar review of petitioner's claim). The federal district courts and courts of appeals are treated as experts in such matters, and the Court both recognizes their familiarity with local law and expects it.

B. Pragmatic considerations

The state collateral proceedings in *Harris v. Reed* possessed an attribute of direct appeal that is crucial to the rational and sensible application of *Long's* plain statement

rule: a written opinion. 489 U.S. at 258. In addition, *Harris* did not involve two circumstances that are common in state and federal collateral proceedings, the presentation of multiple grounds for relief and the repetitive litigation of claims. *Id.* In the handful of cases, like *Harris*, where these factors are combined, the plain statement rule appears a suitable solution to the problem of state decisions that are ambiguous as to actual reliance on state law grounds. However, to view such a course of state proceedings as typical is unrealistic.

The *Long* formulation both of the plain statement rule and of the condition precedent for its application embodies a presumption that the state judgment under review will be accompanied by an opinion that sets forth the bases of decision. Indeed, *Long* is replete with references to the state court's opinion. For example, the Court stated:

> It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to decide issues of state law that go beyond the *opinion that we review*, or to require state courts to reconsider cases to clarify the grounds of their decisions.

Long, 463 U.S. at 1040 (emphasis added). Where the state court opinion itself creates ambiguity by addressing federal issues and referring to state law without relying on it, that ambiguity is best and most logically resolved in that opinion. Absent an opinion, the plain statement rule is not susceptible to direct application.

If federal respect for state procedural defaults requires the existence of an opinion, that respect is exacted at too great a price, because an appellate opinion represents the investment of considerable societal resources. It is important that criminal convictions be, and appear to be, the product of fair proceedings. The direct appeal process

itself ensures fairness, and the appellate opinion satisfies society's interest in the appearance of fairness. These interests justify the expenditure of significant resources to provide indigent defendants pursuing direct appeals of right with transcripts, *see Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956), and counsel, *Douglas v. California*, 372 U.S. 353, 35€ (1963). Similarly, these interests warrant the extensive use of judicial resources that is required to produce an appellate opinion, in which a majority of the tribunal typically agrees not only on the ultimate result but on the reasons for that result. Formal briefing by the parties and often oral argument, the preparation of draft opinions, and conferences among the appellate judges precede the issuance of an opinion.

Once these societal interests are satisfied, a presumption of legality attaches to the final conviction. *Barefoot v. Estelle*, 463 U.S. at 887. It is not reasonable either to expect or require that the states expend equivalent resources on collateral review or in cases where the criminal defendant has not properly invoked the jurisdiction of the state court. Blind application of *Long's* plain statement rule in the latter categories of cases is to require no less. *E.g., Nunnemaker v. Ylst*, 904 F.2d 473, 476 (9th Cir. 1990) (California Supreme Court's denial without comment of an original state petition for writ of habeas corpus vitiates the California Court of Appeal's plain statement, on direct appeai, of reliance on a procedural bar), *cert. granted*, ___ U.S. ___, 110 S. Ct. 340 (1990).

Further, state prisoners typically present multiple grounds for relief in petitions for state collateral relief. The federal habeas doctrines of exhaustion and abuse of the writ encourage this practice. Rule 9(b) of the federal habeas rules prevents the piecemeal litigation of claims on federal habeas corpus by foreclosing federal review of claims that could and should have been adjudicated in a prior federal action. Moreover, before presenting all available claims, the state prisoner must have afforded the state

courts a fair opportunity to pass upon the merits of each claim. 28 U.S.C. § 2254(b), (c); *Picard v. Connor*, 404 U.S. 270, 275 (1971). Where the state also has procedural rules designed to discourage the piecemeal presentation of federal claims on collateral review, state habeas petitions are particularly likely to include more than one ground for relief.

If multiple grounds for relief are presented on state collateral review, the appellate court that is the last state court to enter a judgment cannot easily write "in a one-line *pro forma* order . . . that 'relief is denied for reasons of procedural default.'"[6] For example, the Sixth Circuit in *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990), held that an appellate court's statement that "other assertions of error are either without merit or not preserved for appellate review" is ambiguous and does not preclude federal review. Although the state appellate court's reference to the preservation of error under state law occurred on direct appeal, the Sixth Circuit's reasoning could be extended to a state appellate court's *pro forma* statement on collateral review that the issues presented are without merit or procedurally barred. The purpose for issuing a summary order would thereby be defeated, because state appellate courts would be required to address expressly each specific claim presented on collateral review, stating whether it was procedurally barred.

Finally, although the *Harris* Court only purported to extend *applicability* of the plain statement rule of *Long* to habeas review, 489 U.S. at 265, its literal language expands the *scope* of that rule to the derogation of concerns of federalism and comity. The requirement that "the *last* state court rendering a judgment in the case 'clearly and expressly' state[ ] that its judgment rests on a state procedural bar," 489 U.S. at 263 (emphasis added), is tenable

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[6] *Harris v. Reed*, 489 U.S. at 265 n.12.

only in the procedurally unilinear and finite context of a direct appeal. Further, the judgment of the "last" state court is significant only if one assumes that the court has passed upon claims that it previously had not adjudicated. Such an assumption ignores the undeniable fact that state prisoners file repetitious petitions for relief. Indeed, this reality of post-conviction litigation is reflected in the federal habeas rule governing successive petitions and abuse of the writ, Rule 9(b), 28 U.S.C. foll. § 2254.[7]

Following *Harris*, where a state court on direct appeal plainly states that its rejection of a federal constitutional claim rests on the state law ground of procedural default, a state prisoner has every incentive to reurge the claim on state collateral review in hopes that the "last" reviewing court will not reiterate the procedural bar. *Harris*, thus, will burden the state courts with an increased volume of collateral attacks on final judgments while increasing, through the requirement of a plain statement from the last state court, the amount of judicial resources that must be expended to preserve federal respect for state procedural bars. The appellate court that is the last state court to render a judgment in the collateral proceeding is, for the reasons discussed above, unlikely to do more than summarily affirm the denial of state habeas relief; it is particularly unlikely to do so when it has already stated that review and relief are unavailable because of a procedural default. Accordingly, if language in *Harris* must be literally applied, it "undermines the finality of state review procedures and encourages the petitioner's repetitious raising of frivolous points in hopes that some last court, somewhere, will not incant the magic phrase of procedural bar." *McCoy v. Lynaugh*, 874 F.2d 954, 959 (5th Cir.), *stay denied*, ___ U.S. ___, 109 S. Ct. 2114 (1989).

[7]The Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner in the pending case of *Ylst v. Nunnemaker*, No. 90-68, provides statistics regarding the workload of the California Supreme Court. *Id.* at 8-9. The situation in California exemplies the problems existing in virtually every state.

II.

THE CONDITION PRECEDENT TO APPLICATION OF THE PLAIN STATEMENT RULE DOES NOT EXIST IN CASES WHERE THE VERY PRESENTATION OF FEDERAL CLAIMS TO THE STATE COURTS WAS NOT PROCEDURALLY CORRECT.

The plain statement rule announced in *Long* presupposes that the party seeking federal review previously has presented his claims to the state courts in a procedurally correct manner. On direct review,

> [w]hen "'"the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."'"

Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 550 (1987), *quoting Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), *quoting Fuller v . Oregon*, 417 U.S. 40, 50 n.11 (1974), *quoting Street v. New York*, 394 U.S. 576, 582 (1969). Likewise, a party who fails to invoke properly the jurisdiction of a state's highest court is foreclosed from invoking this Court's certiorari jurisdiction. *Newman v. Gates*, 204 U.S. 89, 95 (1907). In such cases, thus, the condition precedent for application of the plain statement rule--state court reliance on federal law--simply is presumed not to exist.

As the Court plainly indicates in *Rotary Int'l* and the cases cited therein, application of the plain statement rule on direct review does not operate to inject ambiguity into a state court decision that is silent on federal constitutional issues. Because the Court does not apply *Long* in such a

fashion on the "primary avenue" of direct review, it defies logic to suggest that *Long* be so applied in the "secondary and limited" context of federal habeas review. *See Barefoot v. Estelle*, 463 U.S. at 887. Moreover, the fact that this type of procedural default does not constitute an absolute bar to federal habeas review cannot justify a converse presumption that the state court, although not properly presented with federal issues or without jurisdiction to review those issues, nonetheless considered them. Such an assumption is not authorized in the context of exhaustion, *Castille v. Peoples*, 489 U.S. 346, 351 (1989), and it should not be made here. Indeed, it is precisely because the bar to federal habeas review is not absolute that such a false presumption is not warranted. The exceptions of cause-and-prejudice and miscarriage of justice adequately further, in appropriate cases, the federal interest of vindicating constitutional rights.

In the case at bar, Coleman forfeited collateral review in the Virginia Supreme Court because of a default during that proceeding. The pertinent order of the Virginia Supreme Court granted the Commonwealth's motion to dismiss Coleman's appeal, a motion that was based exclusively on Coleman's failure to file a notice of appeal within the time period prescribed by state law. Although the order recited that all the pleadings filed by the parties had been considered, the court did not mention federal law or discuss the merits of Coleman's claims. Here, not only does the order fairly appear to rest on the state procedural bar, but the course of state proceedings does not yield any other reasonable interpretation. In contrast to *Harris*, the federal courts below found that no ambiguity inhered in the state order with respect to the basis of decision.

As discussed more fully in Respondent's Brief, the distinction between *dismissal* of an appeal and the *denial* of review is meaningful under Virginia law. By explicitly granting the Commonwealth's motion and dismissing Coleman's appeal, the Virginia Supreme Court made a

statement of significance: it plainly communicated that disposition of the appeal rested on the procedural grounds identified in the motion. The state court's only failure, if it can be considered such, was not to couch its disposition in the terminology used by the federal courts. This Court should not "'force resort to an arid ritual of meaningless form,'" by insisting that state courts attach a particular label to their otherwise clear procedural dispositions. *See James v. Kentucky*, 466 U.S. at 349 (state bar to review stemming from defendant's request for an "admonition" rather than an "instruction" was not adequate to preclude direct federal review, because the procedural requirement did not further rationally a legitimate state interest), *quoting Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). Coleman asks the Court to do no less.

Indeed, the state procedural basis for the supreme court's order is so clear that Coleman repeatedly has conceded the issue. He went so far as to ask this Court, in a petition for writ of certiorari directed to the Virginia Supreme Court, to order the state court to consider the merits of his claims. Even in his brief on the merits in this proceeding, Coleman acknowledges that his state appeal was dismissed because a notice of appeal was not timely filed; he merely assails the independence of that procedural disposition.[8] Brief for Petitioner at 11. Coleman, thus, does not dispute the Virginia Supreme Court's *actual reliance* on his procedural default as the basis for dismiss-

[8]Citing *O'Brien v. Socony Mobil Oil Co.*, 207 Va. 707, 152 S.E.2d 278, 284 (1967), Coleman contends that the state procedural bar is not "independent" because the Virginia Supeme Court's decision whether to permit a late appeal is governed by the merits of the federal issues presented. As the cases cited in *O'Brien* make clear, out-of-time appeals are granted only where the right that has been abridged is a constitutional right of appeal or a constitutional right to effective assistance of counsel on appeal. *Id.*; *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277, 278 (1970). These constitutional rights are not implicated on state collateral review. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

ing his appeal, and it is the issue of actual reliance that the plain statement rule was intended to clarify. That rule was not designed to relieve federal courts of the obligation of assessing the independence and adequacy of the state ground of decision. Accordingly, state courts are not required, each time a procedural bar is imposed, to iterate the legitimate interests furthered by the rule, trace the rule's history to show that the bar is consistently imposed, or set forth the historical underpinnings of the rule to demonstrate that it was not prompted by federal law. Application of the "plain statement" rule to the order at issue here would not assist the federal courts in dealing with a state decision that is ambiguous as to the ground of decision but, rather, would create ambiguity where none would otherwise exist.

As discussed *supra*, the "plain statement" rule does not obviate federal inquiry into questions of state law, but merely reduces the instances when such inquiry is necessary. Even in cases where a state court opinion, as opposed to a mere order, exists, this Court has examined state law and the course of state court proceedings to determine whether the state court decision is based primarily on federal law. For example, in *Caldwell v. Mississippi*, 472 U.S. 320, 326-27 (1985), the Court examined the state procedural posture of a federal constitutional claim that arguably had been defaulted because it had not been presented to the state appellate court as a specific ground of error. The Court noted that, although the petitioner had not raised the claim as a ground of error in state court, the issue was raised *sua sponte* by the Mississippi Supreme Court, discussed by the parties at oral argument and in post-argument briefs, and addressed in the state court's opinion. Likewise, in *Ohio v. Johnson*, 467 U.S. 493, 497 n.7 (1984), the Court referred to Ohio's "syllabus rule," providing that the appellate court's holding is contained in the syllabus rather than the opinion, in ascertaining whether there existed an adequate and independent state ground of decision.

The Court also went beyond the face of the opinion under review in *New York v. Class*, 475 U.S. 106 (1986). Specifically, the Court relied upon the New York appellate court's policy of pretermitting consideration of constitutional claims in cases where statutory construction would resolve the controversy and held that the state court's disposition of the constitutional claim indicated the absence of a state statutory ground of decision. *Id.* at 109-10. Additionally, this Court has determined that the opinion of a state court rested on federal law where the state precedent upon which the court below relied interpreted federal constitutional requirements. *Michigan v. Chesternut*, 486 U.S. 567, 571 & n.3 (1988); *see also Oliver v. United States*, 466 U.S. 170, 175 n.5 (1984) (finding that Maine precedent cited in state court's opinion construed federal constitution and then applying plain statement rule).

Where the judgment of the last and highest state court to which federal issues are presented is not accompanied by an opinion, there exists an even greater need for federal courts to consider state law and prior state court proceedings to ascertain whether the condition precedent for application of the "plain statement" rule exists. In the instant case, to require the lower federal courts to ignore the fact that the Commonwealth's motion to dismiss was procedural in nature, where the state court explicitly referenced and granted that motion, is senseless. Coleman's assertion that they should do so, if accepted, would annihilate the substantial concerns of federalism, comity, and finality.

Under Coleman's proposed application of the plain statement rule, even a state appellate court's express adoption of a lower court's findings of procedural default would not be respected on federal habeas review, because the federal courts would have to look beyond the last order entered in the case. *Contra, McCoy v. Lynaugh*, 874 F.2d at 958 (Texas Court of Criminal Appeals' denial of habeas relief on the basis of the findings and conclusions of the

trial court constitutes a plain statement of its reliance on the procedural bars imposed by the lower court); *King v. Lynaugh*, 868 F.2d 1400, 1402 & n.2 (5th Cir.) (same), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1576 (1989). Likewise, it would require state courts to make significant statements about state law in federal terms. For example, the statement of the Circuit County of Buchanan County, Virginia, that certain claims "should be alternatively dismissed on the ground that they are procedurally barred under the rule of *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom. Parrigan v. Paderick*, 419 U.S. 1108 (1975)," would bar federal habeas review. Although the federal courts would be required to examine state law to ascertain precisely which procedural rule precluded review, inclusion of the magic words "procedurally barred" would earn federal respect. However, if the court had merely stated that the claims "should be alternatively dismissed under the rule of *Slayton v. Parrigan*" its reliance on the state law ground would not command equal federal respect, because reference to *Slayton* would be necessary to reveal the procedural nature of the disposition. A more meaningless distinction can scarcely be imagined.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

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